

Questions and Answers - Examination Obstruction

Question: What should I do if an association tells me that the documents that I need are inaccessible because they are in remote storage off site?

Answer: Advise the association that it must give you the documents' specific location and immediate and complete access to wherever the association stored the documents. 12 USC § 1464(d)(1)(B)(ii) and 12 CFR § 563.170(c).

Question: What should I do if an association refuses to provide me with access to any records until the OTS Director requests access, since 12 USC § 1464(d)(1)(B)(ii) uses the phrase, "upon request by the Director"?

Answer: As an examiner appointed by the Director, you have the delegated authority to act on the Director's behalf in the examination of federally insured thrifts. 12 USC §§ 1462a(h)(4), 1463(a)(1) and 1464(a). Your request for records meets these statutory requirements; the association must provide you with prompt and complete access.

Question: What should I do if an association asserts privilege and refuses to provide me with access to documents about a large, nonperforming commercial property loan because the borrower has sued the institution?

Answer: Consult with your EIC, field manager, or regional counsel, as this is not a matter protected from regulatory review by an attorney-client privilege. The association must immediately instruct its counsel to provide you with prompt and complete access to all documents and records concerning the status of this loan. 12 USC § 1464(d)(1)(B)(ii) and 12 CFR § 563.170(c).

Question: What should I do if an association tells me it has no underwriting records on a large, real property loan?

Answer: Advise the association that OTS will cite it for violation of 12 CFR §§ 560.100, 560.101, and/or 563.170(c), and proceed with a more thorough review of this asset. Remain alert to the possibility that the documents exist but are being withheld. Staff comments or documents in other files might indicate the missing association records were created. Like withholding documents, failure to create and maintain critical documents is a red flag indicating possible fraud, insider abuse, or financial manipulation. Keep your EIC or field manager apprised of your findings.

Question: What should I do if I request documents during a focused, special limited examination and the association denies me access because it is not a regularly scheduled, full-scope examination?

Answer: Federal law requires associations to provide examiners, including safety and soundness, compliance, trust, and information systems examiners, prompt and complete access to all association records and employees during any type of examination. The statute does not limit the authority to examinations of a specific length, scope, or type. 12 USC § 1464(d)(1)(B)(ii).

Question: What should I do if I request accounting records on a particular transaction and the association's auditor denies me access based on an assertion of accountant-client privilege?

Answer: There is no such generally recognized privilege. The auditor must provide you with prompt and complete access to the documents. Notify your regional counsel and regional accountant because this may be an ethical or contractual breach by the auditor.

Question: What should I do if an association denies my request outside an examination for access to the documents necessary to perform a status update on a large, troubled loan?

Answer: You are working to determine the condition of the association in the course of supervision. The association must give you prompt and complete access to all relevant documents and records of any type. 12 USC § 1464(d)(1)(B)(iii).

Question: What should I do if an association tells me that I may review copies of loan files maintained by computer, but may not review originals because the originals are stored off site in a remote facility for safekeeping and cannot retrieve the originals without considerable expense.

Answer: This is an impermissible screening tactic. As yet, you have no assurances that the copies are exactly the same as the originals or that the originals have all the required disclosures and signatures. You have no assurances that the originals ever existed, or still exist. Additionally, the association's computer may be tracking which documents you are retrieving, permitting the association to review and "correct" any problems with the originals before you see them. The association must provide you with prompt and complete access to all relevant documents of any type, especially originals, wherever those documents may be. 12 USC § 1464 (d)(1)(B)(ii) and 12 CFR § 563.170(c).

Question: What should I do if an association's board of directors refuses to allow me to observe their meetings, citing reasons such as highly confidential merger discussions, personnel issues, or the like?

Answer: 12 USC § 1464(d)(1)(B)(ii) and 12 CFR § 563.170(c) obligate the association to allow you to attend the meetings. Additionally, you may remind the directors that 12 CFR § 510.5 prohibits you, as an examiner, from disclosing or permitting the disclosure of proprietary or confidential association information obtained through OTS examination and supervision functions.

Question: What should I do if an association designates a particular employee to assist the examination team to find and locate documents, but that employee is frequently unavailable to assist?

Answer: It may be appropriate for the association to designate an individual to assist the examination team, as long as the arrangement provides you with "prompt and complete" access to records and staff. You should insist upon access to information within a reasonable time. In some circumstances, a "reasonable" time may require immediate access to information. In all cases, because of examination schedules, the association must arrange to comply quickly with your information requests.

Question: What should I do if an association requires that outside counsel review requested documents for privilege before producing them for my review, or that an attorney be present when I wish to interview an employee?

Answer: In both cases, alert your EIC, field manager or regional counsel. In the first case, insist that counsel's review be conducted quickly and without unreasonably delaying your access to the documents. Insist upon access to the original documents and a written list of any requested documents withheld based on a claim of privilege. In the second case, requiring association counsel to be present is an impermissible restriction on your access to information. You should inform management that you would not agree to any such restrictive condition on your right to interview and obtain information from any officer, employee, or agent of the association.

Question: What do I do if the thrift holding company is an insurance company regulated by a state Insurance Commissioner?

Answer: Continue with your holding company exam as you normally would. (You may use information from, or provided to the state Insurance Commissioner. Regional offices should request this information in advance.) The Gramm-Leach-Bliley Act (GLBA) does not apply to holding companies or insured depository institutions themselves. Therefore, you may perform a full examination of the holding company. 12 USC §§ 1831v(c) and 1467a(b)(4).

Question: What do I do if I discover extensive business records of a functionally regulated affiliate at the holding company, along with other records that I have access to?

Answer: You may review any records maintained on holding company premises. Generally, the GLBA limits the circumstances under which you may go on the premises of a functionally regulated entity. The GLB also limits your ability to order documents or talk to the staff of a functionally regulated entity. The GLB does not prevent you from reviewing records maintained on holding company or thrift premises. 12 USC § 1831v(a).

Question: What do I do if I determine, in the course of an examination, that an insurance subsidiary of a thrift holding company may pose a material risk to the safety and soundness of the association? The functionally regulated affiliate provides low premium, large limit coverage for high risk items (concentrations of hurricane coverage along the Southeast Atlantic) and places its portfolio in high risk investments (junk bonds)?

Answer: You should have already reviewed the publicly available records, externally audited financial statements, information available at the holding company's premises, and any available state insurance commissioner's or regulator's examinations and other reports about the functionally regulated affiliate. You or your supervisor should have discussed your concerns with the commissioner's or regulator's office. Highlight the bases for your concerns in the documents available and discuss the information with your supervisor, regional counsel, and (possibly) the regional director. Together you will determine whether these facts warrant an on-site OTS examination of the functionally regulated affiliate. You should document your work paper files to indicate which of the GLBA criteria you base the justification for your examination. If there is the potential for enforcement action, such as the issuance of a subpoena, you should include regional enforcement counsel in your discussions.

Question: What should I do if the association engages in transactions with an affiliate that is functionally regulated and all of the TWA records are on the functionally regulated affiliate's premises?

Answer: We enforce the rules concerning the association's transactions with affiliates. Therefore, the association must provide you with "prompt and complete" access to all relevant documents and staff concerning any transaction involving the association wherever they may be, even if located on the premises of a functionally regulated affiliate. You may require an association to obtain and keep records necessary for it to oversee the transactions. 12 USC § 1464(d)(1)(B)(ii) and 12 CFR § 570(c). Your review of the association's TWA materials at their storage site does not constitute the examination of a functionally regulated affiliate under the GLBA. An association or a thrift holding company cannot shield its documents or transactions from your review by storing them at the offices of a functionally regulated affiliate.

Question: What should I do if I need to interview a dual employee, a person who is employed both by the association and a functionally regulated affiliate?

Answer: You may interview the employee concerning matters within the scope of his or her duties and responsibilities on behalf of the association.